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IN THE

Supreme Court of the United States

ST. JOHN'S UNITED CHURCH OF CHRIST, *et al.*,

Petitioners,

v.

CITY OF CHIGAGO, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Seventh Circuit

BRIEF OF AMICI CURIAE CIVIL LIBERTIES FOR URBAN BELIEVERS AND THE AMERICAN INDIAN MOVEMENT IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI IN THIS CASE[1]

The American Indian Movement ("AIM") is first a spiritual movement, a religious rebirth, and then the rebirth of dignity and pride in a people. AIM was born out of the dark violence of police brutality and voiceless despair of Indian people in the courts of Minneapolis, Minnesota. From the inside AIM people are cleansing themselves; many have returned to the old traditional religions of their tribes, away from the confused notions of a society that has made them slaves of their own unguided lives. The organization is committed to Indian sovereignty and the security of Indian religious beliefs and practices. AIM has an interest in this litigation because it seeks to protect the rights of Indian peoples to believe and practice their religions. One of AIM's specific concerns is that, like the cemetery involved in this case, Indian burial grounds will be threatened by the Seventh Circuit's ruling. Sovereignty, land, and culture cannot endure if a people is not left in peace.

Civil Liberties for Urban Believers ("CLUB") is an unincorporated association of Illinois Churches. Founded in 1993, its purpose is to fight for the civil rights of Christian believers in the Chicago area and throughout the United States, particularly in the area of land use. CLUB has an interest in this

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[1] All parties have consented to the submission of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici*'s intention to file this brief. *Amici* state that no portion of this brief was authored by counsel for a party and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

litigation because it seeks to protect the rights of Christian Churches and believers from laws that burden their religious beliefs and practices. One of CLUB's specific concerns is that various urban properties of its churches will be threatened by the Seventh Circuit's ruling, as targeting of religious practices by hostile local governments may increase.

SUMMARY OF THE ARGUMENT

The Seventh Circuit's decision will lead to a wide variety of unintended consequences that will unnecessarily trample the Free Exercise Clause. The court below held that before Plaintiffs can obtain relief from a government regulation that substantially burdened their religious exercise, they have to prove that the government acted with the actual *motive* to suppress their religious beliefs and practices.

Requiring proof of an illicit motive in free exercise cases, however, is not the law. If those whose religious actions were substantially burdened were required to prove the actual motive of the government before obtaining relief, then the Free Exercise Clause would be effectively gutted. State actors, in the pursuit of a valid secular end, could trample religious beliefs with impunity.

Religious liberty is our first freedom and deserves the highest form of protection. One of the ways this Court has protected religious exercise is to require the state – when it has enacted a non-neutral, non-generally applicable law – to prove that it has a compelling interest for the law, and that such law is narrowly tailored. Requiring a plaintiff to first prove an illicit motive, however, would relegate this protection meaningless.

No one would contest that the state can pursue legitimate, needed repairs to an international airport. This is not the issue in this case. Rather, the issue is the methodology the lower courts used in

concluding that a church's religious beliefs and practices can be trampled by the state. The Seventh Circuit erred in requiring Plaintiffs to prove an illicit motive on the part of the government actors, and certiorari should be granted to correct this error.

REASONS FOR GRANTING THE WRIT

I. The Seventh Circuit's Decision Would Gut Our First Freedom – Religious Liberty.

In 2003, the Illinois Legislature amended the Illinois Religious Freedom Act ("IRFRA" or "Act") to specifically exclude cemeteries and gravesites that stood in the way of the expansion of the Chicago O'Hare Airport. *See* 775 ILCS 35/30 (the "Amendment"). As the dissent correctly noted, this Amendment was neither neutral nor generally applicable. *See St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 644-54 (7th Cir. 2007) (Ripple, dissenting). The fact that the Amendment was placed in the IRFRA is proof enough that its intent was to target religious cemeteries. *See id.* Indeed, the Amendment was specifically enacted to strip religious cemeteries near the O'Hare Airport (of which there is only one now being threatened – the St. Johannes cemetery) of their legal protections under the IRFRA. *See id.* at 633-34.

Nevertheless, the Seventh Circuit upheld the Amendment. After recognizing that the destruction of the St. Johannes cemetery would be a sacrilege to the Plaintiffs, and after recognizing that the St. Johannes cemetery is the only cemetery currently affected by the Amendment, the court concluded that

the Plaintiffs failed to prove a critical point – that "the object of the [O'Hare Modernization Act] was 'to infringe upon or restrict practices because of their religious motivation.'" *Id.* at 632 (quoting *Lukumi*, 508 U.S. at 533).

However, this Court has never required a person whose religious beliefs and practices have been substantially burdened by a law that is not neutral nor generally applicable to prove actual motive. If this were the case, then most, if not all, of the religious beliefs and practices that have already been protected by this Court could be in jeopardy. The religious beliefs of minority religions could be subjected to oppressive state regulations. In short, requiring plaintiffs to prove the actual motive of state actors before obtaining relief from a law that substantially burdens their religious beliefs and practices would gut our first freedom – religious liberty.

The following is just a short list of some of the consequences that could result if the Seventh Circuit's decision were allowed to stand:

A. Tax Exemptions for Churches Could be Threatened.

If the Seventh Circuit's decision were allowed to stand, nothing would prohibit states or counties from removing a worship center's tax exemption. For example, suppose a Muslim mosque was near a blighted area of the city – an area where the state wanted to encourage economic growth and economic activity. And suppose there was only one religious

assembly near this area – a Muslim mosque. Illinois could amend the IRFRA to state, "Nothing in this Act limits the authority of municipalities to remove the property tax exemption of buildings near areas that the city has designated as economic growth areas." If such an amendment were passed, a city could strip the Muslim mosque of its tax exemption just because it was near an area where the city wanted to spur economic activity.[2]

To highlight the problem with requiring a plaintiff to prove a motive hostile to religion before he can bring a free exercise claim, consider the result if the city actually acted with a secret hostile religious motive. Still, the plaintiff would have the burden of proving the city acted with a motive hostile to religion. It would not be enough that the plaintiff proved that the law was neither neutral nor generally applicable.

B. Food Pantries and Soup Kitchens

If the Seventh Circuit's decision were allowed to stand, food pantries and other religious/charitable activities of churches could be threatened. For example, suppose that in Champaign, Illinois, the restaurant industry was struggling. In order to promote the restaurant industry, the city placed restrictions on all food distributions within the city without a proper license. One of the "food distributors" is the Salvation Army that operates a

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[2]In the same way, a law could exempt all parking lots from property taxation except those churches located in residential areas if the city argued that its motivation was to limit parking areas in residential areas, not to suppress religion.

soup kitchen and gives away food. Illinois could amend the IRFRA to state, "Nothing in this Act limits the authority of the City of Champaign to license or regulate the public distribution of free food within Champaign, Illinois." The law would be constitutionally permissible, even though the obvious target of the law was the Salvation Army, the only religious provider of food services in the city, because its objective was secular – to promote the economic viability of the restaurant industry.

C. Worship Centers

Worship Centers could come under attack if the Seventh Circuit's decision is allowed to stand. Zoning officials would be allowed to discriminate against religious organizations as long as they were pursuing a secular motive.[3]

But even more intrusive, the government could put itself in the worship service itself in the name of national security. For example, suppose the government believed that a particular church had a reputation for having international connections, including those from the Middle East. Illinois could pass an amendment saying, "Nothing in this Act limits the authority of law enforcement personnel to place cameras in certain buildings where there is reason to believe that such organizations have had connections with Middle Eastern countries or terrorist connections."

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[3] The fact that the Religious Land Use and Institutionalized Person's Act, 42 U.S.C. § 2000cc *et seq.*, might offer protections to the church is not relevant to whether the Free Exercise clause also should independently protect churches from discriminatory laws.

D. The Amish's Belief

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Supreme Court protected the Amish religious belief to not send their children to school after the eighth grade. The Amish believed "that their children's attendance in high school, public or private, was contrary to the Amish religion and way of life. They believed that by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but ... also endanger their own salvation and that of their children." *Id.* at 209.

Under the Seventh Circuit's rationale, the religious beliefs of the Amish could be regulated by the state. As long the state was not acting with the *motive* of infringing the Amish's religious beliefs, the state could require all children under the age of 18 to attend public or private school. For example, Illinois could pass an amendment to the IRFRA stating, "Nothing in this Act limits the authority of the City of Chicago to exercise its general police powers under its education laws to require compulsory attendance of all Illinois residents under the age of 18." Such amendment would be obviously targeting the Amish, just like section 30 of the ILRFRA targeted the St. Johannes' cemetery. Yet under the Seventh Circuit's rationale, such a law would be constitutional as long as the state was acting pursuant to a secular motive (such as an educated citizenry), and not a motive to restrict religious beliefs.

E. The Church of the Lukumi Babalu's Religious Beliefs

In *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520 (1993), the Court protected a church's practice of animal sacrifice by striking down a city ordinance that banned the ritual slaughter of animals. Under the Seventh Circuit's holding, however, the City of Hialeah could once again ban the ritual slaughter of animals, as long as they acted with a secular objective.

The key to the Court's holding in *Lukumi* was that the law in question was not neutral or generally applicable, but rather, seemed to target the Lukumi's religious beliefs. *See id.* at 535. Under the Seventh Circuit's holding, the religious practices of the Lukumi church could be restricted as long as the City was not acting with the purpose of restricting ritualistic animal slaughter. So, for example, the following exception to the IRFRA would be permissible – "Nothing in this Act limits the authority of municipalities to exercise its general police powers to encourage the preservation of animals for food." Such an amendment would be serving a laudable goal – preservation of edible food. It would be constitutional even if it prohibited a church from engaging in animal sacrifice; a religious practice that the Supreme Court said "has ancient roots." *Id.* at 524.

These are just a few of the many examples of how religious exercise could be burdened if plaintiffs were forced to prove an illicit motive by a state actor to succeed on a free exercise claim. But this Court

has never required proof of actual motive before it extends constitutional protections to religious beliefs. Once a plaintiff has proved that a particular law is not neutral or generally applicable, and burdens his religious beliefs, the law is unconstitutional unless it passes strict scrutiny review. Our first freedom deserves no less protection.

CONCLUSION

Amici respectfully request that this Court grant certiorari.

Respectfully submitted,

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